In the more recent case of *U.S. v. Lovett,* 328 U.S. 303, the Supreme Court further clarified its earlier opinions of this type of legislation. It said:

> "They [the Cummings and Garland cases] stand for the proposition that the legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without judicial trial are bills of attainder prohibited by the Constitution." (328 U.S. at 305)

Section 1251 (a) (6) (C) possesses all the attributes o a bill of attainder described in the above three cases. It outlaws by legislative fiat the individuals of a named and ascertainable group, namely, members of the Communist Party, and inflicts punishment and penalties upon them without judicial trial.

The Constitutional injunction against bills of attainder applies alike to aliens and citizens. The Court has repeatedly declared that an alien lawfully here is entitled to the same constitutional safeguards as a citizen. *Lem Moon Sing v. United States,* 158 U.S. 538, 547; *Wong Wing v. United States,* 163 U.S. 228, 238; *Yick Wo v. Hopkins,* 118 U.S. 356, 369.

The framers of the Constitution were not unmindful that bills of attainder had been passed by several states affecting British citizens and banishing them from American territory or confiscating their property. (Sec. 4g, Laws of New York, 1779, Ch. 25; 2 Belknap, History of New Hampshire, 1912). Since bills of attainder against aliens were known before the Constitution, there is no basis for the contention that the prohibition was in-

tended for the benefit of citizens only. The Constitutional prohibition is in fact absolute and qualified. It simply says that no bill of attainder "shall be passed."

There is no merit in the idea that the deportation does not constitute punishment and therefore does not apply to this Petitioner. Petitioner contends that deportation in fact inflicts literal punishment and so constitutes in law a deprivation of rights and privileges. *Bridges v. Wixon,* 326 U.S. 135, 154.

The penalty of deportation which the Government seeks to impose upon Petitioner, according to Mr. Justice Brandeis, will deprive him of "all that makes life worth living." *Ng Fung Ho v. White,* 259 U.S. 276, 284.

Even if deportation is held not to be criminal punishment, aliens are not deprived of the protection of the constitutional prohibition against bills of attainder. On the contrary, legislation imposing no criminal punishment whatsoever has been declared in violation of this section of the Constitution solely because it deprives individuals of various rights, privileges, and salaries. *United States v. Lovett,* 328 U.S. 303; *Ex Parte Garland,* 4 Wall. 333, 337; *Pierce v. Carskadon,* 83 U.S. 234; *Cummings v. Missouri,* 4 Wall. 277.

In the case of *Ex Parte Garland,* supra, the Court stated:

> "The question in this case is not as to the power of Congress to prescribe qualifications but whether the power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution." 4 Wall. 379-80.

The paucity of cases in United States judicial history declaring legislative acts to be in violation of the Constitutional prohibition against bills of attainder demonstrates that the doctrine has had deep and widespread acceptance by the legislative and executive branches of our Government.

Petitioner submits that the legislation which we here question falls squarely within the time honored principle condemning bills of attainder. We believe that this Court recognizes the brutal nature of the Act in question and its harsh application to this Petitioner. In the final analysis, the Court must be guided by the clear language of the Constitution and this language leaves the Court no choice but to strike down the Act as a bill of attainder.

The strong tide of opinion in some quarters which ran against all persons who were alleged or intimated to have had any Communist connections, no matter how long ago, has subsided. We suggest that after a momentary lapse, sane standards of fairness and good judgment have recovered the initiative in this country and statutes such as the Act in question should now be re-examined with a view to appraising their constitutionality in the cold light of reason free from the impassioned currents of politics. In order to alleviate the suffering of many aliens such as Petitioner, who at no time did or said anything against the interests of this country, but who are unfortunately caught up in the toils of a vicious statute, this Court need not overrule its own precedents in *Galvan* and *Harisiades*.

Having not previously ruled on the question of a bill of attainder it may in this case proceed to examine it and strike down the Act on this ground.

The policy of this Court to exercise a great restraint in constitutional cases is well known; yet against this policy must be placed the urgent need for strict protection of the liberties not only of American citizens but of those who have lawfully made their home here for many years. Not only humane considerations, but the essential structure of our democratic life as embodied in the Bill of Rights cry out for the Court to act and to act now. The plight of Petitioner, who faces deportation to a land he has scarcely known, whose language he does not read, and where he has no friends or family is indeed moving; however, it must be multiplied many times to understand the full magnitude of the harsh application of the Act in question. The continued operation of the law can only be assessed as a brutalizing influence on American life as a whole. Deportation has always been, next to capital punishment, the gravest penalty that could ever be imposed. From the Middle Ages onward it has been viewed as a barbaric practice, and the Constitution, as a rule of law, has as its chief function the elimination of acts which offend the thoughtful soul of man.

If the Court will not re-examine its decisions in *Galvan* and *Harisiades*, then it should at least strike down the Act as a bill of attainder.

2. The Evidence Shows that the Alleged Membership of the Petitioner in the Communist Party was not a Meaningful Political Association Under the Rule of Rowoldt v. Perfetto.

In *Rowoldt v. Perfetto*, 355 U.S. 115, the Supreme Court expanded upon the test laid down in *Galvan v. Press*, supra, by requiring that an order of deportation must be supported by "substantial" proof that an alien had a "meaningful association" "not wholly devoid of political implications".

It is possible to compare the testimony in *Rowoldt* with that in the case at bar and to determine therefrom whether the alleged participation of Petitioner in the Communist Party was more or less "meaningful" than that of the Petitioner in *Rowoldt*.

In *Rowoldt*, it will be recalled that the alien admitted that he was a member of the Communist Party for about a year and that during that time he attended Communist Party meetings and paid membership dues (355 U.S. 116-7). Rowoldt worked in the Communist Party bookstore in which Communist and Marxist literature was sold and he demonstrated a high degree of sophistication concerning Communism and the history of the Russian Revolution (355 U.S. 118, 120, 129-30).

He testified that he joined the Communist Party for economic reasons during the depression (355 U.S. 117-18).

By way of comparison, Petitioner's alleged connection with the Communist Party, which he vigorously

denied at on hearing (Tr. 198, 203, 204, 220; R. 54), amounted only to the attendance at certain Communist Party meetings and the payment of membership dues (Tr. 14, 15, 17, 19, 22, 25, 27, 67 and 69). He also helped circulate the "Labor New Dealer", a C.I.O. newspaper (Tr. 15, 19 and 20).

Petitioner was and apparently still is ignorant of Communist history and theory, even according to a Government witness (Tr. 70, 75, 201, 202; R. 61, 62).

Petitioner's motive for his alleged association with Communism were economic, even according to his accusers.

The Court of Appeals in its decision (p. 7, 8) places considerable stress upon the alleged leadership role of Petitioner, and the testimony that he belonged to what members of the Party called "the top fraction". A close analysis of the testimony indicates that Wilmot testified that he was possibly a "functionary" (Tr. 15) and that he was in the top fraction of the Party (Tr. 27), but he provided no definition of these terms. For all the reader of the record can know, the terms "functionary" and "top fraction" are meaningless.

The witness Knipe, however, denied that Petitioner was a "functionary" (Tr. 68) or that he held any office (Tr. 66, 68) other than a passing reference to his being on the Executive Board of a Branch (Tr. 68). There was no evidence that Petitioner in fact performed any functions as a leader.

Nowhere in the Record is there the slightest bit of evidence that Petitioner, if he was a Communist Party member, was aware or interested in its political, as distinct from its economic and welfare activities.

CONCLUSION

Petitioner believes that this case is an excellent opportunity for this Court to once and for all end the legislative abuse of aliens who have been long-time residents of this country. Petitioner believes it is time to call an end to fanciful red hunting and to return to the elementary standards of American fairness and justice. Because the Court has not yet ruled upon the question of whether the Act is a bill of attainder, it need not overrule its decisions in *Galvan* and *Harisiades* to rid the country of a law that even the District Court describes as "a harsh one" (R. 85). If, however, the Court does not desire to review the constitutional issues at this time, it could dispose of this case in the interests of justice by holding that the evidence presented by the two extremely unreliable witnesses of the Government is inadequate to support the order of deportation.

For the foregoing reasons, the writ should issue.

Respectfully submitted,

REUBEN LENSKE,
Attorney for Petitioner.

APPENDIX I

(Title of Court and Cause)

Appeal from the United States District Court for the District of Oregon

Before: Stephens, Chambers, and Hamley, Circuit Judges

HAMLEY, Circuit Judge:

In this habeas corpus proceeding petitioner seeks to invalidate an order for his deportation as an alien who has been a member of the Communist party. After a hearing in the district court, an order was entered dismissing his application. Petitioner appeals, contending that he was not shown to have a "meaningful" association with the Communist party, as that term is used in Rowoldt v. Perfetto, 355 U. S. 115, 120. He also argues that the act under which he was ordered deported is unconstitutional.[1]

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[1] The warrant of arrest in the deportation proceedings was issued on June 17, 1952. The statute under which the proceedings were instituted was therefore § 22 of the Internal Security Act of 1950, 64 Stat. 987, 1006 (amending the Act of October 16, 1918, 40 Stat. 1012, as amended) as amended by § 1 of the Act of March 28, 1951, 65 Stat. 28. The applicable part of § 22 of the 1950 act prior to the 1951 amendment reads as follows:

"That any alien who is a member of any one of the following classes shall be excluded from admission into the United States:

. . . .

"(2) Aliens who, at any time, shall be or shall have been members of any of the following classes:

. . . .

"(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States . . .

Petitioner, whom we shall call Mackie, is a native and citizen of Finland. He entered the United States in 1909 at the age of ten months, and has resided in this country continuously since that time. Mackie has lived in Portland, Oregon, for about thirty-three years. He had service in the United States Army for three months in 1944, and for three days in 1942. He was honorably discharged for the "convenience of the government." Mackie married an American citizen on June 24, 1945. There are no children as the issue of this marriage, but his wife has a sixteen-year-old son by a former

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"Sec. 4 (a) Any alien who was at the time of entering the United States, or has been at any time thereafter, . . . a member of any one of the classes of aliens enumerated in section 1(2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States."

The 1951 amendment to the above-quoted statute reads as follows:

" . . . That the Attorney General is hereby authorized and directed to provide by regulations that the terms 'members of' and 'affiliated with' were used in the Act of October 16, 1918, as amended, shall include only membership or affiliation which is or was voluntary, and shall not include membership or affiliation which is or was solely (a) when under sixteen years of age, (b) by operation of law, or (c) for purposes of obtaining employment, food rations, or other essentials of living, and where necessary for such purposes."

Such a regulation was promulgated by the Attorney General, effective April 4, 1951. See 16 Fed. Reg. 2907.

The amendatory act of March 28, 1951, setting out the above-quoted qualifications upon the meaning of the terms "members of" and "affiliated with" was repealed by the Immigation and Nationality Act of 1952, 66 Stat. 163, 280, effective December 24, 1952. See Schleich v. Butterfield, 6 Cir., 252 F.2d 191, 193. But the substance of the relevant portion of § 22 as originally enacted was incorporated in the Immigation and Nationality Act of 1952, 66 Stat. 163, 205, 8 U.S.C.A., § 1251(a)(6)(C). See Rowoldt v. Perfetto, supra, page 116.

marriage. Mackie's aged father and mother and two sisters also reside in this country.

On June 17, 1952, a warrant for the arrest and deportation of Mackie was issued by a district director of the Immigration and Naturalization Service. The warrant was served on September 12, 1952. A hearing was held before a special inquiry officer beginning May 11, 1953, and ending May 21, 1953.

On June 30, 1953, the special inquiry officer issued a written decision determining that Mackie was deportable and ordering his deportation. The ground stated for this action was that Mackie had become a member of the Communist Party of the United States after entry into this country. The specific finding was that Mackie had been a member of the Communist party during the years 1937-1939.

Mackie appealed to the Board of Immigration Appeals. The Board found that the record established the ground of deportability by reasonable, substantial and probative evidence. The appeal was accordingly dismissed on September 8, 1953. On November 11, 1954, Mackie moved to reopen the deportation proceedings to enable him to apply for suspension of deportation. This motion was endied on November 29, 1954, but when later renewed was granted on December 23, 1954.

The reopened hearing was held before a special inquiry officer. This officer, on February 16, 1955, entered a written opinion denying the application for suspension of deportation. Suspension was denied for the reason that Mackie had not made a "clean break" with the

Communist party, and there was reason to believe that he was still sympathetic to its principles. The Board of Immigration Appeals affirmed this ruling on May 8, 1955.

While this application for suspension of deportation was pending, Mackie, on December 13, 1954, filed a petition in the United States District Court for a writ of habeas corpus. The grounds on which Mackie relied in this petition were that the evidence did not support the order of deportation, and the statute under which the order was entered was unconstitutional. After the order denying suspension of deportation was entered on February 16, 1955, Mackie amended his petition for a writ of habeas corpus to include as an additional ground that the denial of his motion for suspension of deportation was arbitrary and capricious.

The district court after hearing rendered a decision denying the application for a writ of habeas corpus. Niukkanen v. Boyd, D.C.D.Ore., 148 F.Supp. 106. An order to this effect was entered on March 6, 1956. Mackie appealed to this court and we affirmed. Niukkanen v. Boyd, 241 F.2d 938. Certiorari was denied on December 16, 1957. 355 U.S. 905.

Rowoldt v. Perfetto, supra, was decided by the Supreme Court on December 9, 1957. On December 27, 1957, Mackie filed a motion before the United States Immigration and Naturalization Service for another hearing on his status as a deportable alien. The ground stated for this motion was that the decision in Rowoldt redefined the evidential and substantial requirements

of membership in the Communist party so as to take Mackie out of the class of deportable aliens. This motion was denied by the Board of Immigration Appeals on March 26, 1958.

Relying on the same ground and also renewing the contention that the act is unconstitutional, Mackie filed the instant habeas corpus proceeding on April 4, 1958. The petition was denied by the district court, after hearing, on April 14, 1958, and this appeal followed.

The contention that the act under which the deportation order was entered is unconstitutional as applied to Mackie is identical with a similar contention made on the previous appeal. It was there disposed of adversely to Mackie and will not be re-examined at this time.[2]

We therefore turn to appellant's contention based on the Supreme Court decision in Rowoldt. Mackie argues that it was not proved that he had been a "member" of the Communist party within the meaning of that statutory term, as construed in the Rowoldt decision.

In Galvan v. Press, 347 U.S. 522, the Supreme Court for the first time dealt with the meaning of the term "member" as used in § 22 of the Internal Security Act of 1950. In the course of its opinion the court discussed the kind of a showing which would be insufficient to establish membership and the kind of a showing that would not be required. It further defined the minimum showing that would have to be made by the government.

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[2] See, also, Ocon v. Guercio, 9 Cir., 237 F.2d 177, 179-180.

It was held, at least inferentially, that membership would not be established by proof that an alien had accidentally, artificially, or unconsciously in appearance only, joined the Communist party with no real knowledge of its platform and purposes. On the other hand, the court ruled, establishment of membership did not require proof that an alien had joined the Communist party with full appreciation of its purposes and program. The minimum proof required to establish membership, the court held, was that an alien had "joined the Party, aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will."

Applying the latter test, the court in Galvan found that under the evidence upon which the hearing officer apparently relied the alien had been a "member" of the Communist party and was therefore deportable. This evidence was to the effect that the alien joined the party on the request of a man he assumed to be an organizer, he attended a number of meetings, he did not apply for citizenship because he feared his party membership would be exposed; and he had been active in, and an officer of, the Spanish Speaking Club, an alleged Communist party unit.

In Rowoldt v. Perfetto, supra, the Supreme Court did not purport to modify the principles to be applied in construing the term "member" as announced in Galvan v. Press. It applied those principles to what the court regarded as the different facts of the Rowoldt

case. It concluded that the minimum requirements of proof referred to in Galvan had not been met.

In this connection the court stated in effect that the evidence in Rowoldt failed to establish "the kind of meaningful association" required by the 1950 act, as amended. The use of the words "meaningful association" is but a shorthand way of referring to the minimum-proof requirement for establishing membership as set out in Galvan.

The precedent value of Rowoldt, then, is not to be derived from an undue emphasis upon the words "meaningful association," as used in that opinion. Rather, it is to be gained by comparing the evidence of membership which was there found to be insufficient with that contained in the record of the case under current consideration.

In Rowoldt v. Perfetto the finding of "membership" rested on Rowoldt's own testimony. According to that testimony, Rowoldt joined the Communist party in the spring or summer of 1935, paid dues, and attended meetings. He remained a member until arrested late in 1935 in connection with deportation proceedings. His reason for joining the party was that he regarded the party and the "fight for bread" as going "hand in hand."

Rowoldt testified that he had no job at the time and that those around him had the idea that they had to fight for something to eat and for clothes and shelter. He and his associates, Rowoldt testified, were not thinking of "overthrowing anything." In stating that they had to "fight" for something to eat, Rowoldt meant that

they had to ask the city, state, and national government for help. The kind of help they wanted was exemplified by the unemployment laws later passed and economic assistance received.

Rowoldt's only active work for the party was that of running its bookstore for a short period. He was a salesman in the store but received no compensation. This store was an official outlet for communist literature. Rowoldt testified that he never advocated change of government by force or violence.

In the instant case, unlike Rowoldt, the government produced indepedent evidence concerning the alien's communist activities, and the latter initially offered no refutation except that of character witnesses. At the original hearing held in May, 1953, Mackie was called to the witness stand by the special inquiry officer and answered general questions concerning his age, residence, place of birth, and the like. The government then called two witnesses.

According to their testimony, Mackie was a dues-paying, card-carrying member of the Communist party from at least 1937 until 1939. In the latter year he was dropped from membership for nonpayment of dues. During the period of his membership Mackie attended from thirty to thirty-five meetings of the "Albina Section" of the Communist party in Portland, Oregon. Once or twice a month Mackie went to the office of the "Labor New Dealer," a weekly trade union newspaper, to obtain copies for distribution. This newspaper was Communist controlled, and was considered to be a Communist party "setup."

Frequently during these visits to the newspaper office Mackie actively participated in discussions which members of the Communist party held in a back room. These discussion pertained ot the policies of the party and the circulation of the newspaper as a party organ. On one occasion Mackie attended a closed party meeting in Aberdeen, Washington, referred to in party circles as a "plenum." This term was used by members of the party in referring to a meeting held for the purpose of reporting the regional activities carried on within the party.

Mackie, according to this testimony, was not an ordinary member of the Communist party, but belonged to what members of the party called the "top fraction," except with regard to its waterfront activity.

At the close of the government's case, several character witnesses were called to testify in Mackie's behalf. As before noted, however, Mackie declined to take the witness stand himself for the purpose of refuting the testimony of the government witnesses concerning his association with the Communist party.[3] At later hearings on his motion to suspend the order of deportation, and in the district court on this habeas corpus application, Mackie did testify—categorically denying that he had ever been a member of the Communist party.

Although appellant attacks the credibility of the government witnesses, the special inquiry officer appar-

[3] The disadvantage to Mackie in his failure to rebut testimony given by the government witnesses was called to his attention by the special inquiry officer, but Mackie persisted in his refusal to give further testimony.

ents found their testimony worthy of belief. The Board of Immigration Appeals and the district court found no warrant for re-evaluating that testimony, and neither do we. Precedent for adopting this course is to be found in Galvan v. Press, where the Supreme Court deemed it appropriate to accept evidence which the hearing officer had found reliable.

In our view the evidence in the instant case more than meets the minimum requirements of proof to establish Communist party membership, as set out in Galvan v. Press, and as referred to in Rowoldt v. Perfetto as "meaningful association." There is no indication here, as in Rowoldt, that the alien joined the party only for "bread and butter" purposes. On the contrary, our appellant, unlike Rowoldt, actively participated in party councils, and was considered to be in a relatively high regional echelon of the party.

Mackie's association with the Communist party, in our opinion, was at least as meaningful as that of Galvan in Galvan v. Press.[4] It was much more meaningful than that of Diaz in Diaz v. Barber, 9 Cir., 261 F.2d 300, whom this court characterized as "a small rabbit in the Communist hutch."

Affirmed.

(Endorsed:) Opinion. Filed Apr. 6, 1959.

Paul P. O'Brien, Clerk.

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[4] See, also, Williams v. Mulcahey, 6 Cir., 253 F.2d 709; Wellman v. Butterfield, 6 Cir., 253 F.2d 932; and Bong Youn Choy v. Barber, D.C.N.D.Cal., 162 F.Supp. 629, all of which refer to Rowoldt v. Perfetto, but hold the evidence sufficient to sustain a deportation order.

APPENDIX II

(Title of Court and Cause)

JUDGMENT

Appeal from the United States District Court for the District of Oregon.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Order of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment
Filed and entered: April 6, 1959
PAUL P. O'BRIEN, Clerk